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In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, under the filed rate doctrine and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), the Interstate Commerce Commission (ICC) is barred from obtaining an injunction against a motor carrier's attempt to collect charges in violation of the ICC's credit regulations, notwithstanding the ICC's express authority to regulate credit, 49 U.S.C. 10743(b), and to "bring a civil action * * * to enforce" the Interstate Commerce Act and regulations thereunder, 49 U.S.C. 11702.

II

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Interstate Commerce Commission; Transcon Lines; and Leonard Gumport, trustee.

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-9a) is reported at 9 F.3d 64. The prior opinion of the court of appeals (Pet. App. 10a-40a) is reported at 990 F.2d 1503. The opinion of the district court (Pet. App. 44a-70a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1993. On January 14, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 23, 1994, and the petition was filed on February 16, 1994. The Court

granted certiorari on April 18, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and the ICC's credit regulations, 49 C.F.R. Pt. 1320, are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 74a-87a).

STATEMENT

The ICC has express authority to "bring a civil action * * * to enforce" the provisions of the Interstate Commerce Act (Act) and regulations thereunder, 49 U.S.C. 11702(a)(4), and this Court has recognized that the Commission's authority includes the "power to seek a federal-court injunction requiring a carrier to comply with the [ICC's credit] regulations." *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 349 (1982). Under review is a judgment of the court of appeals holding that, notwithstanding the ICC's express authority to enforce the Act and its implementing regulations, the ICC is barred by the filed rate doctrine and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), from obtaining an injunction that would prevent respondents, Transcon Lines and its trustee in bankruptcy, from attempting to collect liquidated damages (as compensation for collection costs) from late-paying shippers in direct violation of the ICC's credit regulations.

A. *The Statutory Scheme*

The Act requires that interstate motor common carriers publish their shipping rates in tariffs filed with the ICC, and that carriers charge or receive only those published rates. 49 U.S.C. 10761, 10762(a)(1). Generally, common carriers are required by the Act to retain possession of transported property until the shipper pays the applicable filed rate. 49 U.S.C. 10743(a). If, however, the ICC has promulgated "regulations * * * governing the payment for transportation and service and preventing discrimination," a carrier may "give up possession at destination of property transported * * * before payment." 49 U.S.C. 10743(b)(1). The ICC has promulgated detailed regulations that, accordingly, provide the exclusive means for a motor carrier to release transported property before payment is made, *i.e.*, to release goods on credit. See *Ex Parte No. MC-1*, 4 I.C.C.2d 340 (1988); 49 C.F.R. Pt. 1320 (reproduced in relevant part at Pet. App. 80a-87a).

Under the credit regulations, a carrier may release goods without payment for a credit period not to exceed 30 days.[1] The carrier may assess separate interest charges on a late-paying shipper under 49 C.F.R. 1320.2(e)(3).[2] If the shipper fails to pay the freight

[1] A carrier must generally present a freight bill for payment within seven days, 49 C.F.R. 1320.3(a)(2) and (b)(1), and "[t]he credit period shall begin on the day following presentation of the freight bill." 49 C.F.R. 1320.2(b). The standard credit period is 15 days, 49 C.F.R. 1320.2(c), but the ICC's regulations permit a carrier to provide different standard credit periods in its tariff rules. 49 C.F.R. 1320.2(d). "Such credit periods," however, "shall not be longer than 30 calendar days." *Ibid.*

[2] Interest compensates a carrier for the loss of the use of the money during the delinquency period and ensures that delinquent shippers do not enjoy an advantage over shippers who make timely payments. See 49 C.F.R. 1320.2(e)(3)(ii)(A) (carrier must notify shipper that the "only purpose" of the interest charges (called

charges within the credit period, the carrier may also assess, in addition to the freight charges, "liquidated damages" to compensate it for the cost of collection. 49 C.F.R. 1320.2(g)(1). The ICC's regulations require the liquidated-damages provision to be contained in a tariff filing, and permit liquidated damages to be measured in either of two ways: (1) as a "separate additional charge" (stated as a flat amount or as a percentage of the freight bill), 49 C.F.R. 1320.2(g)(1)(i), or (2) as "the full, non-discounted rate instead of the discounted rate otherwise applicable."[3] 49 C.F.R. 1320.2(g)(1)(ii).

The ICC's regulations place several mandatory conditions on efforts by carriers to collect such liquidated damages. First, the carrier must specifically state the liquidated damages that apply to late payments in the original bill for the shipment. 49 C.F.R. 1320.3(c).[4] Second, the carrier must issue a revised freight bill that includes the liquidated damages charge within 90 days

"service charges" by the rule) "is to prevent a shipper who does not pay on time from having free use of funds due to the carrier").

[3] A carrier typically files tariffs containing tiers of rates, ranging from relatively high, collectively set bureau rates, to a variety of lower "discount" rates for particular traffic and markets. *Ex Parte No. MC 208: Nonoperating Motor Carriers--Collection of Undercharges*, 8 I.C.C.2d 742, 745 (1992), rev'd on other grounds *sub nom. White* v. *United States*, 989 F.2d 643 (3d Cir. 1993). Discount rates are often expressed as a percentage of the bureau rates. (Transcon's rates at issue in this case exemplify that approach. See Vol. I, Resp. C.A. Excerpts of Record 40 (TCON 625, 9th Revised Page 587)).

[4] 49 C.F.R. 1320.3(c) states in relevant part: "When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that 'failure timely to pay freight charges may be subject to tariff penalties' (or a statement of similar import)."

after the expiration of the authorized credit period. 49 C.F.R. 1320.2(g)(2)(vi). Third, the carrier may apply liquidated damages "only to the nonpayment of original, separate and independent freight bills"; liquidated damages may not be applied "to aggregate *balance-due* claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent."[5] 49 C.F.R. 1320.2(g)(2)(iii).

A shipper cannot raise the carrier's violation of the credit regulations in defense of an action to collect the filed rate. *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982). The ICC, however, has "ample authority to police the credit practices of carriers and thereby to deter improper practices," *id.* at 349, and the discretion to frame appropriate "remedies for a carrier's violations of the [credit] regulations," *id.* at 352. In particular, the ICC has the "power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations."[6] *Id.* at 349.

[5] As the ICC explained in promulgating the credit regulations, "[t]he rules expressly limit the application of the collection expense charges only to the initial nonpayment of the original freight bill, and exclude their application to balance-due claims. Balance-due claims involve uncertain and often disputed charges presented by bankruptcy trustees or their assignees concerning shipments that were transported as long as five years prior to the shipper's receipt of the balance-due claim. (This addresses legitimate shipper concerns in this area.)" *Ex Parte No. MC-1*, 4 I.C.C.2d at 346.

[6] The Act authorizes the ICC to "bring a civil action * * * to enforce [the Act] * * * or a regulation or order of the Commission * * * when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11702(a)(4).

B. *The Present Controversy*

1. Transcon Lines was once the twelfth largest motor carrier in the United States. After Transcon filed for bankruptcy, its trustee engaged a rate auditor, collection agency, and collection attorney to review the carrier's tariffs and accounts. As a result of those efforts, respondents sought to collect from shippers approximately $8 million in unpaid freight charges and approximately $15 million in additional, liquidated-damages charges. Pet. App. 15a-16a. Those additional charges were based on claims that the shippers had not paid, within 90 days after shipment, the amount the trustee now claims should have been charged, and that the shippers were therefore not entitled to the discount rate. In such instances, the trustee sought to collect the higher bureau rate. *Id.* at 30a.

The trustee's claim for liquidated damages purported to enforce the terms of Transcon's tariffs filed with the ICC. One of Transcon's tariffs set forth "discount" rates that were expressed as percentages of higher "bureau" tariff rates. Transcon also had a "rules" tariff that contained a "loss-of-discount" provision. That provision stated that discounts "shall apply only when tariff charges are paid within 90 calendar days from the date of shipment," and indicated that payment within that period was a "condition precedent" to application of the discount.[7] Pet. App. 15a, 17a-18a. As respondents

[7] The provision stated (Vol. I, Resp. C.A. Excerpts of Record 41 (TCON 103-A, Item 210)):

have conceded, Br. in Opp. 4-5, the trustee's attempt in this case to enforce its "loss-of-discount" tariff provision violated several of the prerequisites for asserting liquidated damages set forth in the ICC's regulations.

2. The ICC brought this action in district court to enjoin respondents from applying Transcon's loss-of-discount provision to shippers in violation of the ICC's credit regulations. Specifically, the ICC alleged (and it is undisputed) that Transcon's original bills did not advise shippers of the consequence of late payment, as required by 49 C.F.R. 1320.3(c); revised bills were not issued until several years after the 90-day period provided in 49 C.F.R. 1320.2(g)(2)(vi); and the loss-of-discount provision was being applied by a bankruptcy trustee on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii). The ICC requested an injunction that would prohibit respondents from pursuing claims in violation of those requirements. Pet. App. 14a-16a.

The district court granted summary judgment for respondents. The court held that because Transcon's loss-of-discount provision was found in its filed tariff, the ICC's regulations could not be applied to prevent its enforcement. The court concluded that the ICC's regula-

1. [D]iscounts * * * shall apply only when tariff charges are paid within 90 calendar days from date of shipment.

2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 CFR 1322 [*sic*; 1320.2]. This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

tions, as applied here, are not "valid as against the filed rate doctrine."[8] Pet. App. 62a (Tr. 24).

2. The court of appeals affirmed in relevant part.[9] Pet. App. 14a-40a. The court recognized that Transcon's trustee stands in the shoes of the carrier and is therefore subject to the ICC's authority to "bring a civil action of enforcement against the carrier's estate, 49 U.S.C. § 11702." *Id.* at 26a. The court also recognized that the district court had erred in holding that the ICC's credit regulations are simply invalid. *Id.* at 31a, 34a, 40a. Nevertheless, relying on *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), the court of appeals concluded that the ICC could not enjoin respondents from violating the ICC's credit regulations "because the Commission's regulations cannot be enforced in this way to undercut the filed rate." Pet. App. 34a. The court explained (*id.* at 32a):

> Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in *Maislin*. Although the Act authorizes the ICC to regulate carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

[8] The court also accepted the trustee's argument that Transcon's discount tariffs were invalid because the tariffs identified shippers by account code rather than by name. Pet. App. 58a-60a (Tr. 19-21), 67a (Tr. 31).

[9] The court of appeals reversed the district court's holding with respect to shipper account codes (see note 8, *supra*) on the ground that the trustee lacked standing to challenge the validity of the carrier's own tariffs. Pet. App. 34a-36a. This Court denied the trustee's cross-petition for a writ of certiorari seeking review of that holding, *Gumport* v. *ICC*, 113 S. Ct. 2987 (1993), and that issue is no longer involved in this case.

3. The government filed a petition for a writ of certiorari, arguing that the court of appeals' holding conflicted with the principle of *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993), decided after the court of appeals had issued its opinion in this case. In *Reiter*, this Court ruled that the filed rate doctrine does not preclude the avoidance of the tariff rate based on claims that are specifically authorized by the Interstate Commerce Act. *Reiter* applied that principle to uphold a shipper's right to reparations for an unreasonable rate, holding that the shipper's right can be invoked to "avoid[] * * * the tariff rate," notwithstanding the filed rate doctrine. *Id.* at 1219. The petition suggested that, because *Reiter* established that the assertion of express statutory rights is not precluded by the filed rate doctrine, the court of appeals should be directed to reexamine its holding (*i.e.*, that the ICC cannot assert its enforcement rights in this case) in light of *Reiter*. The petition also suggested, in the alternative, that the Court should consider summary reversal in view of this Court's prior recognition in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*, that the ICC may enforce its credit regulations through an injunction. This Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Reiter*. *ICC* v. *Transcon Lines*, 113 S. Ct. 2955 (1993).

On remand, the court of appeals concluded that *Reiter* did not require revision of its analysis. Pet. App. 1a-9a. The court read *Reiter* as limited to a holding that claims specifically accorded to *shippers* by the Act are not trumped by the filed rate doctrine. *Id.* at 4a. It thus found *Reiter* inapplicable here, because shippers cannot assert a defense to an action to collect the filed rate based on a credit-regulation violation. *Id.* at 4a, 8a. The court also reasoned that even if the principle announced in *Reiter* were applicable to claims specifically accorded to *the ICC*, the court would still have to determine "which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions." *Id.* at 5a, 8a.

In balancing the ICC's statutory authority against the policies of the filed rate doctrine, the court first examined the impact on the filed rate doctrine of allowing the ICC to obtain the injunction it sought here. The court concluded that the ICC might use its injunctive powers to achieve "an end-run around the filed rate doctrine." Pet. App. 6a. The court speculated that shippers and carriers might "privately negotiate a discount from the filed rate" and "purposely violate various credit regulations"; then, "[i]f the ICC goes along" with the illegal subterfuge and uses its injunctive powers to prevent a bankruptcy trustee from collecting the filed rate, "the filed rate doctrine would be gutted." *Ibid.* Next, the court examined the impact on the agency's powers to enforce the credit regulations of denying the ICC authority to seek an injunction here. The court believed that even without injunctive powers, the ICC would have a variety of statutory mechanisms to enforce

the credit regulations, and that those remedies would be sufficient. *Id.* at 6a-7a.

In light of that balance, the court of appeals concluded that it should give priority to the filed rate doctrine. Accordingly, the court held, as in its prior opinion, that because Transcon had put its credit terms in its tariff, the filed rate doctrine precludes the ICC from enforcing its credit regulations against respondents through an injunction. Pet. App. 8a-9a.

SUMMARY OF ARGUMENT

The ICC has express statutory authority to seek an injunction to enforce the provisions of the Act and regulations promulgated under it. While the Act generally requires carriers to collect the tariff rate before relinquishing possession of transported goods, the Act permits carriers to release goods on credit if ICC regulations so authorize. The ICC has promulgated detailed credit regulations, and those regulations, among other things, authorize a carrier to release goods on credit and, if a shipper does not pay within the authorized credit period, to obtain liquidated damages to compensate it for the costs of collection. The regulations contain a variety of requirements, however, to ensure that shippers are given fair notice of the prospect of such collection fees and to prevent abuses. When a carrier (or its bankruptcy trustee) is systematically violating those requirements, the ICC is entitled to enforce them through an injunction that prevents the collection of liquidated damages unlawfully imposed on shippers. See *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982).

The filed rate doctrine does not interpose a barrier to the ICC's injunction action. While the filed rate doctrine

preempts equitable defenses asserted by shippers, this Court has made clear that the doctrine accommodates other provisions of the Act, and, in particular, that it does not bar the assertion of express rights of action against the carrier. *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993). That principle is applicable here; the ICC has express power to seek an injunction to prevent regulatory violations, and it exercised that power in this case. The filed rate doctrine does not prevent the use of that statutory power. The court of appeals' analysis, which weighed the filed rate doctrine against the ICC's need for an injunction, encroached on Congress's judgment to equip the ICC with enforcement authority and on the ICC's discretion about how best to enforce the requirements of the Act.

This Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), does not suggest a contrary result. In *Maislin*, the ICC's interpretation of its general power to define unreasonable practices was found to conflict with the filed-rate requirements of the Act, because the ICC's policy prevented the carrier from collecting the filed rate when it had previously negotiated (and failed to file) a lower rate. In this case, however, the ICC's injunction would not enforce unfiled rates. Rather, it would merely require the carrier to apply the filed rate due upon delivery (with interest) and enforce valid regulations that govern a carrier's conduct when it extends credit and seeks to collect liquidated damages for late payment. Because *Maislin* does not suggest that a carrier may circumvent valid regulations in this context by relying on the filed rate doctrine, *Maislin* does not cast doubt on the ICC's exercise of authority in this case.

ARGUMENT

THE ICC IS ENTITLED TO SEEK AN INJUNCTION AGAINST RESPONDENTS' VIOLATIONS OF THE AGENCY'S CREDIT REGULATIONS

A. The ICC Has Statutory Authority To Enforce Its Credit Regulations Through An Injunction

The ICC is expressly authorized by the Act to "bring a civil action * * * to enforce [the Act] * * * or a regulation or order of the Commission * * * when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11702(a)(4). The statute identifies only one exception to that authority: Section 11702(a)(4) states that the ICC may not bring "a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates." Thus, subject to that single exception, Congress has reposed plenary authority in the ICC to seek civil relief in the courts, in order to enforce the Act and its implementing regulations. See *Texas & Pac. Ry.* v. *ICC*, 162 U.S. 197, 203-204 (1896); *ICC* v. *Brannon Sys., Inc.*, 686 F.2d 295, 296 (5th Cir. 1982) (Section 11702(a)(4) gives the ICC "power to seek injunctive relief to enforce the regulatory process unless the governing statute or regulation expressly denies it such authority"); *ICC* v. *All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974) (enforcing credit regulations for rail carriers through an injunction).

The Act explicitly prohibits transactions on credit except in accordance with ICC regulations. 49 U.S.C. 10743. Under subsection (a) of Section 10743, "[e]xcept as provided in subsection (b) of this section, a common carrier * * * * shall give up possession at destination of

property transported by it only when payment for the transportation or service is made." Subsection (b) states that "[u]nder regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service." Invoking that statutory authority, the ICC has promulgated detailed regulations that govern when a carrier may release goods without payment and when it may collect liquidated damages, as compensation for collection expenses, if a shipper fails to make payment within the authorized credit period. The Commission's regulations, 49 C.F.R. Pt. 1320, contain a variety of requirements that carriers must fulfill to collect liquidated damages.

In *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982), the Court considered "the question whether a common carrier's violation of [the] credit regulations issued by the [ICC] bars the carrier's collection of a lawful freight charge from a shipper-consignor who, under the terms of the shipment's bill of lading, is primarily liable for the charge." *Id.* at 337. In that case, a railroad had delivered goods on credit without undertaking an examination of the creditworthiness of the recipient-consignee who was billed for payment. *Id.* at 339. When the recipient failed to pay, the railroad sought to collect the freight charges from the shipper-consignor, who was liable for payment under the bill of lading.[10] The shipper sought to avoid payment of the freight charges by raising the defense

[10] The carrier in *Commercial Metals* sought to collect only the freight charges due, 456 U.S. at 339; the carrier did not seek to collect damages to compensate it for the cost of collection.

that the carrier's failure to investigate the creditworthiness of the recipient violated the ICC's credit regulations. *Id.* at 340-341; see *id.* at 341 n.6 (quoting requirement in 49 C.F.R. 1320.1 (1981) that a carrier may extend credit "upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part").

This Court held that the violation of the credit regulations did not afford the shipper a defense to an action to collect the filed rate. 456 U.S. at 352. The Court noted that, despite the ICC's "comprehensive[] regulat[ion] [of] credit" transactions, "[n]either the statute under which the regulations were promulgated, nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge" or affords an "affirmative defense to a freight charge action." *Id.* at 344-345 (citation omitted). In addition, the Court found that neither the Act's legislative history nor public policy concerns would justify enforcing the credit regulations through a "judicially created remedy of forfeiture of freight charges." *Id.* at 345-351.

The Court did not indicate, however, that carriers could violate the credit regulations with impunity or collect charges regardless of the nature of the credit-regulation violation. To the contrary, the Court stated that the "the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices." 456 U.S. at 349. In particular, the Court stated that the agency's remedies include "the power to seek a federal-court injunction requiring a carrier to comply with the regulations." *Ibid.* The Court concluded that "[t]he remedies for a carrier's

violations of the [credit] regulations are best left to the ICC for such resolution as it thinks proper." *Id.* at 352.

In this case, the ICC exercised the power, expressly acknowledged by this Court in *Commercial Metals*, to seek a federal court injunction that would prevent respondents from violating the ICC's credit regulations. Respondents concede, Br. in Opp. 4-5, that its collection actions violate 49 C.F.R. 1320.3(c), 1320.2(g)(2)(vi), and 1320.2(g)(2)(iii). See also notes 4-5, *supra*, and accompanying text. The violations consist of Transcon's repeated failure to have advised shippers in their original bills of the nature and scope of the potential liquidated damages; its failure to have issued revised bills within 90 days of the expiration of the authorized credit period; and the trustee's submission of aggregate balance-due bills to shippers, despite the express bar in the ICC's regulations on the use of liquidated damages in that setting. These collection actions burden shippers with claims that come years after the transportation in question and of which shippers were not given the notice required by the ICC's rules.[11]

Unless restrained by the injunction sought by the ICC, there is every reason to believe that respondents will persist in illegal conduct. Transcon is not an operating carrier whose conduct may be shaped through relief designed to deter future violations, such as fines. Rather, the trustee's sole goal is to enrich Transcon's bankruptcy estate. In pursuit of that goal, the trustee has embarked on a widespread collection campaign aimed at thousands of shippers, while knowing that this course

[11] See *Ex Parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 5 I.C.C.2d 691, 695, 697 (1989).

of action entails myriad violations of the ICC's credit regulations. The purpose of the ICC's injunction action is to prevent those abuses. While the ICC's injunction would prevent the collection of unlawfully imposed liquidated damages, it would not prevent the trustee from collecting the rate billed at the time of shipment and interest on unpaid charges.

B. The Filed Rate Doctrine Does Not Preclude The ICC's Exercise Of Its Injunctive Authority

The court of appeals held that the ICC could not obtain its requested injunction because the injunction would violate the filed rate doctrine. The filed rate doctrine, however, does not prohibit the ICC from exercising its express statutory authority to obtain an injunction to enforce the Act and the credit regulations.

1. The Act requires that a carrier must publish its rates in ICC-filed tariffs, 49 U.S.C. 10762(a)(1), and "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff," 49 U.S.C. 10761(a). Citing those provisions, this Court has interpreted the Act "'to create strict filed rate requirements and to forbid [a shipper from asserting] equitable defenses to collection of the filed tariff.'" *Security Services, Inc.* v. *KMart Corp.*, No. 93-284 (May 16, 1994), slip op. 4, quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990); see *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922); *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Because Transcon had incorporated its loss-of-discount remedy into its tariff, in order to define the amount of liquidated damages owed by a shipper who fails to make timely payment, the court of appeals concluded that the filed rate doctrine authorized

collection of those charges and required dismissal of the ICC's lawsuit.

The court of appeals' reasoning is incorrect. In *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993), this Court made clear that the filed rate doctrine "does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." *Reiter*, which was "[i]n many ways * * * a sequel" to *Maislin*, involved the question whether an action to collect the tariff rate should proceed to judgment immediately, before a determination by the ICC of whether the tariff rate was unreasonable as alleged. 113 S. Ct. at 1216. The Court rejected the contention that "the so-called 'filed rate doctrine' gives [the carrier and its trustee] absolute entitlement to judgment on their undercharge claims, without defense or counterclaim." *Id.* at 1219. The Court explained:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. * * * It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself.

Ibid. Applying that principle, the Court concluded that the right of shippers to assert "the reparations rights explicitly conferred by § 11705(b)(3)"[12] is not defeated by

[12] 49 U.S.C. 11705(b)(3) provides in relevant part that "[a] common carrier providing transportation or service subject to the jurisdiction of the Commission * * * is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle."

a claim that the filed rate doctrine bars interference with collection of the filed rate. *Ibid.*

The ICC's right to bring an injunction action in this case follows directly from the principle established in *Reiter*. The ICC's action enforces regulations that are authorized by the specific statutory prohibition against credit transactions except in accordance with ICC rules, 49 U.S.C. 10743, and it is brought pursuant to the agency's civil enforcement authority in 49 U.S.C. 11702. In *Reiter*, the Court held that the filed rate doctrine does not trump "the reparations rights explicitly conferred" by the Act, 113 S. Ct. at 1219; here, by identical reasoning, the filed rate doctrine does not trump the ICC's credit regulations and the agency's enforcement rights explicitly conferred by the Act.[13]

The court of appeals, in response to the Court's direction to reconsider this case in light of *Reiter*, purported to distinguish *Reiter* by noting that that case involved the reparations rights of shippers, and this case involves the enforcement rights of the ICC. Pet. App. 4a.

[13] Respondents suggest (Br. in Opp. 18-19) that both the ICC's power to issue credit regulations and its power to seek injunctions are "*general* requirements" of the Act that do not trump the filed rate doctrine under *Reiter*. In *Reiter*, 113 S. Ct. at 1219, the Court acknowledged that the Act's general reasonable-rate requirement does not provide a defense to a collection action based on the filed tariff, in accordance with its earlier holding in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959). But the credit provision is not a "general" requirement in that sense; it is a specific prohibition against release of goods by carriers without payment, unless the ICC specifically authorizes otherwise. 49 U.S.C. 10743. And the ICC's power to request an injunction (49 U.S.C. 11702) is not a "requirement" of the Act at all; it is a tool for enforcing it. For purposes of the issue here, the two provisions in tandem are fully analogous to the reparations right at issue in *Reiter*.

That distinction between the cases, however, has no relevance to the principle of *Reiter*: the filed rate doctrine does not preclude the assertion of claims for which the Act itself provides. The court of appeals appeared to be influenced by the fact that *shippers* cannot invoke the carrier's violation of the credit regulations as a defense to an action to collect the filed rate. Pet. App. 4a. The flaw in that reasoning, however, is that while *shippers* have no general cause of action to enforce the Act and its regulations, the *ICC* does have such an express right, under 49 U.S.C. 11702.

The fact that the ICC rather than a shipper is enforcing express rights provides no support for the court of appeals' novel approach of balancing the filed rate doctrine against the statutory rights conferred on the ICC, to determine "which provision should be given priority." Pet. App. 5a. To the contrary, Congress has already struck that balance in the provisions of the Act. While carriers are bound to observe the filed rate, 49 U.S.C. 10761, 10762(a)(1), Congress gave the ICC express authority to bring an enforcement action when carriers have violated statutory and regulatory requirements.[14] 49 U.S.C. 11702. The purpose of the ICC's action here is to remedy such statutory and regulatory violations. The filed rate doctrine does not bar that remedy. To the contrary, as this Court explained in *Reiter*, the filed rate

[14] Congress carved out a single exception to the ICC's broad authority to bring a civil enforcement action, for provisions of the Act "governing the reasonableness and discriminatory character of rates." 49 U.S.C. 11702(a)(4). This exception is designed to protect the ICC's primary jurisdiction over issues of reasonableness and discrimination; but there is no exception for remedies that may limit or detract from what courts have come to call the filed rate doctrine.

doctrine yields to "claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at 1219.

2. In addition to departing from *Reiter*, the court of appeals' balancing test is unsound on its own terms. Rather than interpreting statutory text, the court's approach required it to make policy judgments that properly belong to Congress and the ICC.

In evaluating the strength of the carrier's claim to the protection of the filed rate doctrine, the court of appeals expressed concern that empowering the ICC to enjoin respondent's collection action "would permit an end-run around the filed rate doctrine," because a shipper and carrier could negotiate a secret discount from the filed rate and then "purposely violate various credit regulations." Pet. App. 6a. "If the ICC goes along" with the subterfuge and "looks the other way," the court asserted, "then the filed rate doctrine would be gutted," because "the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." *Ibid.* Speculation that the ICC might abuse its power by winking at illegal conduct (and that the courts would enforce such an abuse of power), however, is not a proper basis for courts to truncate the scope of the agency's statutory authority. Congress charged the Commission with responsibility to enforce the Act, and, as this Court has recognized, the Commission has a pivotal role in enforcing the credit regulations. *Commercial Metals*, 456 U.S. at 352. If the power that Congress granted were being misapplied—and there is no suggestion in this case or any other that the ICC has used its power to reward illegal conduct—it

is for Congress, not the courts, to rewrite the legislation.[15]

In evaluating the strength of the ICC's need to obtain an injunction, the court of appeals considered the alternative remedies available to the ICC to deter violations of the credit regulations, and concluded that those remedies were adequate to serve the ICC's needs. The court found the ICC's "concern" that it would be unable to enforce the credit regulations without an injunction "exaggerated," because the ICC could invoke other prospective remedies and could impose fines for knowing violations of ICC orders. Pet. App. 6a-7a. The question of how to deploy the Act's remedies, however, rests in the discretion of the ICC. *Commercial Metals*, 456 U.S. at 352. Indeed, the Court in *Commercial Metals* criticized the inflexibility of a judge-made rule that a credit-regulation violation would always prevent a carrier from collecting freight charges, because that rule would bar consideration of factors such as the carrier's intent, the scale of the shipper's responsibility, and the impact of penalizing the violation on the conduct of carriers. *Id.* at 351. Here, the court of appeals' automatic denial to the ICC of the power to seek an injunction would similarly foreclose consideration of

[15] The court of appeals also relied (Pet. App. 8a) on this Court's statement in *Maislin*, 497 U.S. at 132, that the filed rate doctrine is "utterly central to the administration of the Act." As the Court made clear in *Reiter* v. *Cooper*, *supra*, however, the filed rate doctrine does not override other express statutory rights or provisions. The filed rate doctrine is subject to restrictions such as the statute of limitations provision of the Act, see 49 U.S.C. 11706(a) (carrier must bring suit within three years after the claim accrues), and it is subject to the ICC's express enforcement power in Section 11702.

relevant factors. In seeking an injunction, the ICC was entitled to find that the alternative remedies noted by the court—remedies against operating carriers and fines—would be neither logical nor effective against a bankrupt carrier whose trustee is systematically asserting charges in violation of the ICC's credit regulations.[16]

In sum, the court of appeals' evaluation of the relative importance of the filed rate doctrine and the ICC's express authority to enforce its regulations inevitably involved policy determinations that lie beyond the court's authority. The analysis set forth in *Reiter* properly gives effect to the rights explicitly provided in the statute, including the ICC's right to seek a federal-court injunction.

C. This Court's Decision In *Maislin* Does Not Support The Court Of Appeals' Rejection Of The ICC's Action

In its original opinion, the court of appeals found the ICC's injunction action in this case to be invalid for the same reasons that this Court invalidated the ICC policy at issue in *Maislin*. Pet. App. 32a. *Maislin*, however, has no application here.

1. In *Maislin*, this Court considered an ICC policy that was formulated to respond to widespread efforts by bankrupt motor carriers and their trustees retroactively

[16] An enforcement program against operating carriers would not deter bankruptcy trustees from dunning shippers with aggregate balance due bills. And the argument that respondents must be permitted to collect damages from shippers even though respondents may then be subjected to civil or criminal penalties (see 49 U.S.C. 11906, 11914) for doing so in violation of the credit regulations has no basis in the Act or in common sense.

to collect filed tariff rates from shippers who years earlier had negotiated and paid lower rates. While the carriers were obligated to file the negotiated rates in ICC tariffs and shippers believed they had done so, the carriers often failed to make proper tariff filings. The ICC found that such solicitation and billing activities were an "unreasonable practice," and therefore in violation of 49 U.S.C. 10701.[17] This Court disagreed. Relying on the Act's requirements that carriers must file their rates in tariffs and shippers must pay the filed rates, 49 U.S.C. 10761, 10762, the Court held that the ICC was precluded from making the shipper's agreement to a different rate an equitable defense that permitted avoidance of the filed tariff.[18] *Maislin*, 497 U.S. at 126-133.

This case, however, does not involve the enforcement of an ICC regulatory policy that itself conflicts with the filed rate doctrine. The bankrupt carrier in *Maislin* successfully argued that the ICC's policy to enforce unfiled rates was invalid under the text of the statute and this Court's filed-rate-doctrine decisions. The court of appeals in this case, however, assumed that the ICC's credit regulations are valid and enforceable in a wide

[17] See *Ex Parte No. MC-177: National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Ex Parte No. MC-177: Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

[18] In the Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2(e), 107 Stat. 2047-2048, Congress made available an unreasonable practice defense that parallels the defense struck down in *Maislin* to certain shipments occurring before September 30, 1990.

variety of contexts. Pet. App. 6a-7a, 31a, 40a.[19] While *Maislin* holds that the ICC may not use its general "unreasonable practice" powers under 49 U.S.C. 10701 to make it illegal for a carrier to do what other provisions of the Act require, this case does not present that issue. And *Maislin* does not suggest that a carrier may violate *valid* ICC regulations, and then defend against an ICC injunction action by claiming that it was simply following its tariff.

If a carrier could rely on the filed rate doctrine to collect whatever charges were contained in its tariff, regardless of how flagrantly the tariff violates ICC regulations, carriers could effectively nullify ICC requirements through the contents of their tariff filings.[20] It would be particularly paradoxical to hold that credit terms become sacrosanct simply because they are described in a tariff. The Act prohibits the extension of credit absent regulations promulgated by the ICC, and the ICC's credit regulations provide that liquidated damages cannot be collected absent a tariff rule that

[19] Respondents as well take the view in this Court (Br. in Opp. 14) that the ICC's credit regulations are enforceable through fines and other remedies, and they do not argue that the regulations are invalid. Any suggestion to the contrary would be unfounded, in view of the explicit statutory authorization for the ICC to regulate credit transactions, 49 U.S.C. 10743(b), and the deference due to such authorized exercises of agency authority. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[20] The ICC could strike the tariff from its files (and could, in certain circumstances, retroactively reject it), but as this Court has noted, the ICC has for many years lacked the resources to conduct a "comprehensive examination program" of tariffs placed in its files. *ICC* v. *American Trucking Assn's*, 467 U.S. 354, 360 n.4 (1984).

defines those charges. 49 C.F.R. 1320.2(g)(1) and (2)(i). That requirement is an integral part of a regulatory scheme designed to protect shippers against unreasonable and discriminatory charges.[21] It should not be used as a sword to permit the extraction of liquidated damages in violation of regulations that define when and how the liquidated-damages tariff rule may be enforced. Cf. *Security Services, Inc.* v. *KMart Corp.*, *supra*, slip op. 9 (similarly recognizing that the ICC's void-for-nonparticipation regulation governing mileage-based rates validly affords protection against unreasonable or discriminatory charges).

2. *Maislin* is also inapplicable to this case because the ICC's injunction would not require enforcement of negotiated (rather than filed) rates.[22] *Maislin* does not bar the ICC from remedying a violation by "requir[ing] only the application of a different filed rate * * * rather than departure from the tariff schedule entirely." 497 U.S. at 129 n.11 (citing *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86 (1962), and *Adams* v. *Mills*, 286 U.S. 397, 412 (1932)); see *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992). At most, that would be the effect of the ICC's requested injunction here. That injunction would not foreclose the carrier from charging a filed rate. Respondents are entitled to collect the filed *discount* rate—the rate due upon delivery of the goods. Respondents can also collect interest charges from late-paying shippers, in order to be made whole for any delay in payment. The effect of the requested injunction is simply to prevent respondents from seeking additional collection charges that clearly violate the credit regulations. Accordingly, the ICC, by seeking to enjoin the liquidated damages claims in this case, is not interfering with collection of a rate in a way that implicates the filed rate doctrine.

[21] See *Ex Parte No. MC-1: Regulation for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 5 I.C.C.2d 88, 90 (1988).

[22] The higher rate that the trustee claims under Transcon's loss-of-discount provision is a way of measuring liquidated damages for late payment. As the ICC explained in promulgating the credit regulations, "[t]he liquidated damages under either the straight charge or the loss-of-discount method will be conclusively legally presumed by us to compensate a carrier for any and all direct and indirect costs associated with its collection effort. This includes, but is not limited to, such costs as attorneys' fees, court costs, collection agency fees, interest on the unpaid bill, and carrier in-house administrative costs." *Ex Parte No. MC-1*, 4 I.C.C.2d 340, 344 n.4 (1988).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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